6-19-2013

State v. Paez Appellant's Brief Dckt. 40491

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 40491
	)	
v.	)	Ada Co. CR FE-2012-4294
	)	
HECTOR HERMAN PAEZ,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH A. BAIL
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Appellant Hector Paez (hereinafter Mr. Paez and/or Appellant) appeals following a conditional plea of guilty to the crime of felony DUI and persistent violator.

Appellant asserts that the district court erred in denying his motion to suppress because the anonymous informant tip from a citizen was insufficient to provide reasonable suspicion for his seizure by police.

Statement of the Facts

The official versions of the facts as they appear in the PSI are as follows:

> According to the appended police reports, on March 24, 2012 at approximately 9:15 pm, Officers Christensen and Coltrin were on foot patrol for the Treefort Music Festival in downtown Boise, and were approached by MAV Security Supervisor and a private citizen. The citizen advised that he had just had contact with a person who was "very intoxicated" and trying to drive away from the area in a beige colored Ford Taurus. As the citizen described the individual, the Security Supervisor said that the description of the man sounded like the Hispanic male that she had just ejected from the music festival.
>
> Officers Christensen and Coltrin immediately responded to the location where the citizen said the intoxicated individual was located, and located the Ford Taurus parked on Main St. They observed that the vehicle was running and the brake lights were activated, and could see a Hispanic male in the driver's seat, who was attempting to get the vehicle into gear.
>
> Officer Christensen approached the vehicle and tapped on the driver's side window, and seconds later, opened the driver's side door. He immediately detected a very strong odor of an alcoholic beverage coming from inside the vehicle, and the driver, who later

> Officer Christensen observed that Mr. Paez had slow, slurred speech and bloodshot eyes, and Mr. Paez later admitted to consuming two (2) to three (3) beers at the music festival.
>
> STEP Officer Hoffman arrived on the scene and asked Mr. Paez to exit the vehicle, which he appeared to have a very difficult time doing. Mr. Paez had an unsteady gait and his knees would "unlock" while standing, which caused him to quickly dip towards the ground before catching his balance. Officer Hoffman attempted to administer standardized field sobriety tests, and as he was explaining the Walk and Turn Test, Mr. Paez's demeanor changed and he refused to cooperate with the remaining tests. Officer Hoffman placed Mr. Paez under arrest for suspicion of driving under the influence of alcohol, and transported him to the Ada County Jail for a blood draw.
>
> At the Ada County Jail, Mr. Paez became very belligerent and argumentative, and advised that he would not comply with the blood draw process. Officer Mitchell was able to talk him into cooperating, and two (2) samples were collected, resulting in a blood alcohol level of .324.

PSI, p. 3.

Course of Proceedings

Mr. Paez was charged by criminal complaint (and later information) with felony operating a motor vehicle while under the influence of alcohol (one felony conviction within 15 years) and misdemeanor driving without privileges. (R. p. 5, 27.) An information part II was filed charging him with persistent violator. (R. p. 39-41.)

Mr. Paez filed a motion to suppress his seizure and all evidence obtained thereafter, which was denied after a hearing. (R. p. 46-53, 63.) He then entered a conditional guilty plea in which he pled guilty to the felony DUI and persistent violator and expressly reserved his right to appeal the denial of his motion to suppress. (R. p. 66, 67-73.)

The court sentenced Mr. Paez to 15 years with the first 3 years fixed. (R. p. 76.)

Mr. Paez timely appeals. (R. p. 82.)

ISSUE

WHETHER THE DISTRICT COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE POLICE OFFICER LACKED REASONABLE SUSPICION TO SEIZE MR. PAEZ

ARGUMENT

THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE POLICE OFFICER LACKED REASONABLE SUSPICION TO SEIZE MR. PAEZ

A. Standard of review

As to the standard of review for this issue, *State v. Bishop*, 146 Idaho 804 (2009), explained as follows:

> When reviewing a trial court's denial of a defendant's motion to suppress, this Court gives deference to the trial court's findings of fact, which will be upheld so long as they are not clearly erroneous. Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence. Decisions regarding the credibility of witnesses, weight to be given to conflicting evidence, and factual inferences to be drawn are also within the discretion of the trial court. This Court exercises free review, however, over the trial court's conclusions regarding "whether constitutional requirements have been satisfied in light of the facts found." Accordingly, this Court freely reviews the constitutionality of a search and seizure.

Id. at p. 810 (internal citations omitted).

B. The evidence and court's ruling

At the end of the hearing on the motion to suppress, the court made the following findings of fact and conclusions of law:

> The events occurred on March 26, 2012, in Boise, Ada County, Idaho.
>
> The reporting officer, Sergeant Christensen, was attending a festival, where there was a beer garden. Beer was sold.

He was approached by Mr. Lynn McConkie, a security officer well known to Sergeant Christensen, and another unidentified person, and he was told — it's not clear who told him, but it sounds like it was the unidentified person — that a Hispanic male was highly intoxicated, that he was attempting to drive away in a beige Ford Taurus, and Mr. McConkie indicated that it sounded like the Hispanic person who had just been kicked out of the beer garden area because he was intoxicated and causing problems.

The officer started over to the area that was described as the location of the Ford Taurus, could see that the brake lights were on, that the engine was running, and he decided that he better get there in a hurry.

So he ran over, could observe that the driver of the vehicle, in fact, was Hispanic, and had a -- looked, as I recall was sleepy and was having difficulty in carrying out the simple act of putting the car into gear. Also, observed that the motor of the vehicle was running at that time.

Seems to me at this point under Terry versus Ohio the officer had more than a reasonable suspicion of criminal activity, specifically that the defendant was operating a motor vehicle while under the influence of alcohol, and that the officers' actions thereafter were fully justified and came within the exception to warrant requirement.

There is nothing — and just as an aside, I know it's not a very important issue at this point, but clearly the reporting individual was not a paid informant, but a citizen informant, even though his identity is at this point unknown. So considering all of those facts, I think — I conclude that this was a valid Terry stop, and the motion to suppress is denied.

That's my findings of fact, conclusions of law, and order.

Tr. p. 41, ln. 8--p. 43, ln. 2.

C. The court erred in denying the motion to suppress

The relevant legal standards are well established and are set forth by a somewhat similar case, to wit, *State v. Bishop*, 146 Idaho 804 (2009):

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. This guarantee has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). Evidence obtained in violation of the amendment may not be used as evidence against the victim of the illegal government action. *State v. Page,* 140 Idaho 841, 846, 103 P.3d 454, 459 (2004); *see also Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). This rule, known as the exclusionary rule, applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree. *Page*, 140 Idaho at 846, 103 P.3d at 459; *Wong Sun*, 371 U.S. at 487-88. The test is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of [the original] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun*, 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)). Under this test, evidence that is sufficiently attenuated from the illegal government action may be admitted at trial. *Page,* 140 Idaho at 846, 103 P.3d at 459; *see also Wong Sun*, 371 U.S. at 488. When a defendant moves to exclude evidence on the grounds that it was obtained in violation of the Fourth Amendment, the government carries the burden of proving that the search or seizure in question was reasonable. *State v. Anderson*, 140 Idaho 484, 486, 95 P.3d 635, 637 (2004).

The Fourth Amendment's reasonableness requirement has been held to apply to brief investigatory detentions. *See Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). To determine whether such seizures are reasonable, courts first ask "whether the officer's action was justified at its inception." Id. at 19-20. The level of justification required depends on the intrusiveness of the seizure. *Id.* at 20-22. Next, they consider whether the action "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19-20.

Typically, seizures must be based on probable cause to be reasonable. *Florida v. Royer*, 460 U.S. 491, 499-500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime. *Id.* at 498.

> Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. See *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003); *Terry*, 392 U.S. at 21. The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). Still, reasonable suspicion requires more than a mere hunch or "inchoate and unparticularized suspicion." *Id.* at 329 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. *Sheldon*, 139 Idaho at 983, 88 P.3d at 1223; *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Id. 810-811 (footnote omitted).

Bishop, like our case, involved a tip from an informant. In *Bishop*, the Hagerman Police Chief received a call from the City Superintendent who advised the chief that two carnival workers who were in working in town, approached him and indicated that a man had tried to sell them methamphetamine and had asked the City Superintendent to report the incident to police. The City Superintendent relayed the workers' description of the man who was then located by the police chief. After a series of events not relevant here, the man was arrested and brought to the carnival workers who identified him as the man who had tried to sell them methamphetamine.

The Idaho Supreme Court describe the law as it relates to informant's tips.

> An informant's tip regarding suspected criminal activity may give rise to reasonable suspicion when it would "warrant a man of reasonable caution in the belief that a stop was appropriate." *White*, 496 U.S. at 329 (quoting *Terry*, 392 U.S. at 22) (internal quotation and alteration marks omitted). Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided. *See id.* at 328-29 (noting that "an informant's 'veracity,' 'reliability,' and

'basis of knowledge'" are highly relevant factors in determining whether reasonable suspicion exists). In other words, a tip must] possess adequate indicia of reliability in order to justify a *Terry* stop. *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The more reliable the tip, the less information required to establish reasonable suspicion. *White*, 496 U.S. at 330. Factors indicative of reliability include whether the informant reveals his or her identity and the basis of his or her knowledge, whether the location of the informant is known, whether the information was based on first-hand observations of events as they were occurring, whether the information the informant provided was subject to immediate confirmation or corroboration by police, whether the informant has previously provided reliable information, whether the informant provides predictive information, and whether the informant could be held criminally liable if the report were discovered to be false. *White*, 496 U.S. at 331-32; *Williams*, 407 U.S. at 146-47; *State v. Larson*, 135 Idaho 99, 101-02, 15 P.3d 334, 336-37 (Ct. App. 2000). If a tip lacks adequate indicia of reliability, police generally must engage in further investigation before conducting a *Terry* stop. *Williams*, 407 U. S. at 147.

Whether a tip that merely provides a description of a suspect and alleges that he or she committed a crime amounts to reasonable suspicion depends on whether the tip was anonymous. *See Florida v. J.L.*, 529 U.S. 266, 271-72, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000); *see also State v. Van Dorne*, 139 Idaho 961, 965, 88 P.3d 780, 784 (Ct. App. 2004). When such a tip is received from an anonymous informant, the tip generally will not give rise to reasonable suspicion. *See J.L.*, 529 U.S. at 271-72 (concluding that a tip that a young man was carrying a gun did not give rise to reasonable suspicion because the anonymous informant merely alleged that the man committed a crime and provided a description of the suspect). On the other hand, when such a tip is received from a known citizen-informant, the tip is generally sufficient to establish reasonable suspicion. *Van Dorne*, 139 Idaho at 965, 88 P.3d at 784 (concluding that a known citizen-informant's tip indicating that the suspect was likely intoxicated and describing the suspect's vehicle provided police with reasonable suspicion to conduct a stop). Tips made by known citizen-informants are presumed reliable because the informant's reputation can be assessed and, if the informant is untruthful, he or she may be subject to criminal liability for making a false report. *Id.* Accordingly, independent police verification of such tips is generally not necessary. *Id.; see also Williams*, 407 U.S. at 146-47. Still, under the totality of the circumstances analysis, the content of the tip and the informant's basis of knowledge remain relevant in determining

> whether the tip gave rise to reasonable suspicion. *See State v. Zapata-Reyes*, 144 Idaho 703, 708, 169 P.3d 291, 296 (Ct. App. 2007).
>
> An informant need not necessarily give the police his or her name to be considered a known citizen-informant. *Larson*, 135 Idaho at 102, 15 P.3d at 337; *see also United States v. Pasquarille*, 20 F.3d 682, 687 (6th Cir. 1994) (concluding that an informant who called in a report of drug dealing was not anonymous because he identified himself as a person that was transporting prisoners and personally observed the reported illegal activity). Typically, any information that makes the informant's identity readily ascertainable will suffice. *Larson*, 135 Idaho at 102, 15 P.3d at 337; *see also United States v. Reaves*, 512 F.3d 123, 127 (4th Cir. 2008) (stating that police may conclude tipster is credible when he or she "provides enough information to allow the police to readily trace her identity"). This is especially true when it is clear that the informant is not trying to conceal his or her identity; for example, when the informant is seeking police assistance or reporting illegal activity that he or she personally observed. *Larson*, 135 Idaho at 102, 15 P.3d at 337.

Id. p. 811-812 (emphasis added).

In *Bishop*, the Appellant argued that the tip should be regarded as anonymous since the City Superintendent's report was based on information obtained from two unnamed carnival workers.

> If Bishop's characterization of the tip as anonymous were correct, the tip would not give rise to reasonable suspicion because it merely alleged that Bishop had committed a crime and provided a description of his present appearance and location. Miller would have had to corroborate the tip or conduct an independent investigation in order to legally stop Bishop. *See White*, 496 U.S. at 330-32.
>
> Bishop's argument for characterizing the tip as anonymous is unpersuasive. Superintendent Kelley, the individual who actually reported Bishop's alleged attempt to sell methamphetamine, was a known citizen-informant. There is no dispute that Chief Miller knew Kelley's identity at the time Kelley phoned in the tip. Further, by reporting the tip to Chief Miller, Kelley subjected himself to possible criminal liability under Idaho Code section 18-705, which makes it a crime to "knowingly give[] a false report to any peace officer." Because Kelley was a known citizen-informant, his reliability is

presumed.

> The fact that Kelley's tip was based on a report from two unnamed carnival workers does not transform his report into an anonymous tip. Instead, the source of Kelley's information is only relevant in assessing his basis of knowledge. Bishop points to no authority to support the proposition that a citizen-informant's tip should be reclassified as anonymous based solely on his or her basis of knowledge. Moreover, Bishop's argument disregards the fact that the carnival workers were not anonymous; instead, their identities were readily ascertainable. Kelley provided police with sufficient information to trace the workers' identities. This is evidenced by the fact that Deputy Smith was able to locate the workers and have them identify Bishop after he was arrested. And, while it is not clear why the workers reported their allegations to Superintendent Kelley rather than directly to the police, there is no evidence that the workers were trying to conceal their identities. Because both Kelley and the carnival workers were known citizen-informants, the tip is presumptively reliable. Under the totality of the circumstances, however, the content of the tip and the informants' basis of knowledge are still relevant.

Id. p. 812-813.

Our case has some important differences which show that the tip was truly anonymous and was not corroborated. First of all, the district court did remember correctly that it was the citizen informant, and not the security officer known to the police officer, who provided the information about the suspect. (Tr. p. 21, lns. 22-25.) So out case is not like *Bishop* where the City Superintendant was known to the police chief and so the report was not from an anonymous informant. Further, since the security officer did not provide the information, unlike the City Superintendent in Bishop, he had no potential liability for false report.

Next, in our case unlike in *Bishop*, the citizen informant was not just unnamed, but the police were unable to find him again. The police officer testified at the suppression hearing that he did not know the citizen (and was not aware of

any prior contacts with him) and when they went back later to try and find him they were unable to locate him. (Tr. p. 22, ln. 1-4.)

To summarize, an unnamed person came up to the police and provided a description of a person and alleged he was committing a crime. As explained above, this is an anonymous tip which does not give rise to reasonable suspicion. To make matters worse, the police were later unable to locate that person and so he did not later identify Mr. Paez as the subject of his allegations.

What's more, the fact that the person was accompanied by a security guard known to the police changes nothing, because there was no evidence that he knew the citizen either. The information was not relayed through the security guard and so citizen's story was not in any way enhanced by the security guard's pre-existing credibility with the police, and the security guard was not subject to the consequences of a false report since he did not report a crime.

Further, the tip was not corroborated by the security guard. While he claimed that the anonymous informant's description sounds like the description of someone just ejected from the beer garden, the description was merely that he was an intoxicated Hispanic male. The officer testified that there were several hundred, if not a few thousand, people in the area for the event. (Tr. p. 14, ln. 25—p. 15, ln. 2.) Given, this, what is basically just a racial identification is too general to have provided any meaningful corroboration. Further, the police officer testified that the security guard did not go with him over to where Mr. Paez was located, nor positively identified him at any time. (Tr. p. 28, ln. 24—p. 29, ln. 14.)

Likewise, the observations of the police officer, that the driver of the car looked sleepy and appeared to be having trouble putting the car in gear, were just too general to corroborate the anonymous tip. By the way, this was all observed through the closed window of a car when it was dark out. (Tr. p. 16, ln. 2; p. 19, ln. 14.)

It is undisputable that Mr. Paez was seized when the officer opened his car door. But since there was no reasonable suspicion to seize him, his Fourth Amendment rights were violated, and so the evidence following that seizure must be suppressed and the court erred when it held otherwise.

CONCLUSION

Mr. Paez requests this Court reverse the order of the district court denying his motion to suppress and remand this matter to the district court for withdrawal of his guilty plea and further proceedings without the unconstitutionally obtained evidence.

DATED this 24th day of June, 2013.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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